UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DELMAR V. STREET Appellant v. DEPARTMENT OF THE ARMY Agency	DOCKET NUMBER SL0752841009 3 DATE: 27 SEP 1984

OPINION AND ORDER

Appellant filed a timely petition for appeal from the action of the Department of the Army, Fort Leonard Wood, Missouri, removing him from the p tion of Motor Vehicle Operator, WG-5703-06, in the amm tion section, effective November 22, 1983, based on the harge of physical disability to perform the duties of his position.

The presiding official found that the agency showed by preponderant evidence that appellant was physically disabled for his position at the time he was separated because he was unable to lift and carry fifty pounds and over, he was unable to climb continuously in and out of trucks as required by his position, and the performance of his duties in his physical condition was hazardous to himself. The presiding official found further that appellant did not carry his burden of establishing a prima facie case of handicap discrimination by showing that he was a "qualified handicapped person" because there was no reasonable accommodation possible for appellant's physical limitations.

The presiding official, however, determined that under the Board's decision in Douglas v. Veterans Administration, 5 MSPB 313 (1981), the penalty of removal was unreasonable because shortly after his removal appellant obtained successful medical treatment for his disabling condition and was currently physically able to perform the full duties of his position. The presiding official ordered the agency to cancel the removal action and to return appellant to a pay status no later than ten days from the date of the January 26, 1984, regional office hearing at which appellant's evidence established that he was ready, willing and able to work.

The agency filed a petition for review, to which appellant responded. 1/ The agency contends, in substance, that the presiding official erred in mitigating the penalty of removal under Douglas because the agency reasonably exercised its discretion in removing appellant at the time it effected the adverse action; that the presiding official erred by considering the evidence of appellant's recovery from disability which occurred subsequent to the removal action; and that the corrective action ordered by the presiding official left unresolved the question of appellant's pay status for the period of time from the effective date of the removal action to the date set by the presiding official for appellant's return to pay status. The agency's petition for review is hereby GRANTED under 5 U.S.C. § 7701(e)(1).

1/ Although appellant contends that the agency's petition was untimely filed, the envelope in which the petition was mailed was postmarked two days before the initial decision was to have become final. The postmark date is considered to be the filing date. See Patterson v. Department of the Army, MSPB Docket No. DC04328210692 at 2 (February 23, 1984); Kimsey v. Department of the Interior, MSPB Docket No. DE07528210166 at 1 note (January 12, 1984). Thus, the Board finds that the agency's petition for review was timely filed.

The parties have not sought review of the presiding official's determination on the issue of prohibited handicap discrimination. With respect to that matter, the Board discerns no factual error by the presiding official warranting the Board's review.

The material facts of this unique case are relatively undisputed. In the spring of 1982, appellant reported to his supervisor that he was suffering physical problems at work and that he believed that he had a kidney and blood pressure problem.[2] In April 1982, appellant was given a physical examination by an agency physician and was found fit to perform his duties, although the medical officer found that there was a narrowing of the interspaces in the lumbar region of the back which caused appellant "occasional lower back discomfort." Appellant, however, declined to undergo a cystoscopy [3] by the agency physician for his complaint of urinary bleeding because of his apparent belief that a similar examination five years earlier was the cause of the bleeding. The medical officer recommended that appellant submit to a follow-up examination within the next year.[4]

In August 1982, appellant submitted a letter from a personal physician reporting that appellant was taking medication for hypertension and recommending that he be reassigned from the ammunition section to less stressful duties.[5] The agency's medical officer and the acting chief

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[2] See the affidavit of appellant's supervisor, agency hearing exhibit #1.

[3] A cystoscopy is a direct visual examination of the urinary tract with a cystoscope. Dorland's Illustrated Medical Dictionary at 402(25th ed. 1974).

[4] See agency file, tabs 3, 4, 6.

[5] See agency file, tab 5.

of the civilian personnel office, however, concluded that appellant's condition did not prevent him from safely performing his job, based on the prior agency physical examination and the fact that his hypertension was controlled by medication.6/ In September 1982 and January 1983, appellant submitted further letters from his physicians recommending that he be reassigned to less stressful duties because of his hypertension.7/ In June 1983, appellant's supervisor notified the agency's civilian personnel office that he believed that appellant's physical condition was deteriorating to the point that he would not be able to perform his duties and requested that a fitness for duty examination of appellant be scheduled.8/ The agency's medical officer conducted a physical examination of appellant and diagnosed a slightly hypertrophied solitary left kidney, moderate hypertension controlled by medication and continued narrowing of the interspaces in the lumbar region of the back. The physician concluded that appellant was not able to perform all of his present duties and that he should not lift above fifty pounds or continuously climb in and out of the back of trucks. 9/

On August 30, 1983, appellant was reassigned temporarily to the Fort's carpenter shop performing light duties.10/

6/ See agency file, tab 7.

7/ See agency file, tab 9. Neither of the physicians selected by appellant submitted a diagnosis of his urethral or prostate conditions , both of which were eventually diagnosed and successfully treated.

8 See agency file, tab 8.

9/ See agency file, tab 9.

10/ See agency file, tabs 11, 23.

From July 29 through November 1, 1983, the agency reviewed all available vacant positions at the Fort in an attempt to permanently reassign appellant to a position compatible with his skills and medical condition at the same grade or at a lower grade, but because of his lack of clerical skills, an eighth grade education and the lifting limitation, he was found to be unqualified for any available position.11/ Appellant's removal for physical disability was proposed approximately six weeks after his reassignment to light duty and his removal was effected on November 22, 1983.12/

Appellant thereafter filed a timely petition for appeal and requested a hearing. At the hearing the agency introduced the affidavit of appellant's supervisor, and the testimony of an employee relations specialist and the chief of the recruitment and placement branch concerning the agency's efforts to reassign appellant to another position and his inability to perform the duties of his position. Appellant, through his counsel, submitted medical reports prepared by his physicians concerning his physical disability. In a report dated December 16, 1983, physicians from the University of Missouri- Columbia Hospital stated that appellant was admitted for treatment on December 12, 1983, and on the following day a cystopanendoscopy of the

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11/ See agency file, tabs 12, 13, 15, 17, 22, 23. The agency's file discloses that, among other positions, two vacancies were available during this time frame in the position of Motor Vehicle Operator, WG-5703, which appellant would have been qualified to fill but for his physical limitations.

12/ See agency file , tabs 16, 25.
The record is undisputed that appellant did not apply for or receive disability compensation benefits from the Department of Labor's Office of Worker's Compensation Programs. See appellant's post-hearing brief at 3-4, file tab 7. Appellant, therefore, is not entitled to restoration to duty under 5 U.S.C. § 8151(b)(1) and the regulations implementing the statute. See, e.g., Rivers v. Department of the Navy, 6 MSPB 619, 621 (1981).

bladder and a bladder barbotage were performed which disclosed the existence of two urethral strictures.[13] The attending physicians also diagnosed appellant's hypertension and a prostate nodule.[14] An internal urethrotomy[15] was performed on December 13, 1983, and appellant was discharged the following day with written statements from the hospital's physicians reporting that he should remain off work for one week and that after December 21, 1983 he could resume his job without any lifting or medical restrictions.[16] In a more recent report dated January 20, 1984, a third attending physician stated that appellant's hypertension was under control with medication but that he has prostatitis[17] which was being treated. The physician found appellant "to be otherwise in good health. During his hospitalization there was no reason found for him to be physically unfit to perform as a truck driver. He currently has no physical limitations whatsoever and should be able to perform physically in this capacity easily."[18]

Appellant testified that he did have blood in his urine at times which he felt was related to his job, and that his back problems were not related to the narrowing of the interspaces in the lumbar region of his back. Appellant disputed that he was physically disabled at the time of his

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[13] A stricture is a decrease in caliber of a canal, duct or passage. Dorland's at 1483.

[14] A prostate nodule is a small mass of tissue in the prostate gland which is solid and can be detected by touch. Dorland's at 1053, 1267.

[15] A urethrotomy is a cutting operation for curing a stricture of the urethra. Dorland's at 1678-79.

[16] See appellant's hearing exhibit #3.

[17] Prostatitis is an inflammation of the prostate gland. Dorland's at 1267.

[18] See appellant's hearing exhibit #4.

removal and he stated further that he did not seek medical treatment earlier because he could not afford to and he denied that he delayed obtaining treatment in order to get a reassignment out of the ammunition section. Appellant asserted that he was currently able to perform the requirements of his position without the restrictions imposed by the agency's medical officer. The agency declined the opportunity afforded by the presiding official to submit rebuttal evidence. After permitting the parties to file post-hearing briefs, the presiding official issued an initial decision reversing the removal action, based on the de novo evidence presented by appellant at the hearing, because the penalty of removal was unduly harsh and did not strike a balance within the tolerable limits of reasonableness. See initial decision at 12-13.

The Board finds that the presiding official properly admitted into the record the evidence of appellant's recovery from disability, although such evidence came into existence subsequent to the removal action and was not considered by the agency in effecting his removal. The limitation, which the agency urges, on the presiding official's authority to admit de novo evidence that had not been submitted to the agency "would render nugatory the right of appellants to a hearing pursuant to 5 U.S.C. 7701(a) and 1205(a)(1) and our implementing regulations at 5 C.F.R. 1201.24(c)." Chavez v. Office of Personnel Management, 6 MSPB 343, 349 (1981). The right of the parties in a case before the Board to present de novo evidence extends to adverse action appeals.19/ The Board, thus, has stated in Foster v.

19/ For example, the Board has determined that an employee in an adverse action based on unauthorized absence, as in any other adverse action, may submit to the presiding official medical evidence of illness not previously submitted to the agency as a defense to the action, although such evidence may not be of sufficient weight to be determinative of the outcome. See, e.g., Bell v. Equal Employment Opportunity Commission, MSPB Docket No. PH07528110583 at 6 (June 16, 1983); Nunes v. Equal Employment Opportunity Commission, MSPB Docket No. DC07528110716 at 2 (October 6, 1982).

Department of Health and Human Services MSPB Docket No. DA07528110575 at 3 (November 28, 1983):

> The Board has consistently rejected the notion that its scope of review is limited to consideration of the administrative record established before the agency. Zeiss v. Veterans Administration, 7 MSPB 516 (1981); Chavez v. Office of Personnel Management, 6 MSPB 343, 349-50 (1981); Douglas, supra, at 315-318; Parker v. Defense Logistics Agency, 1 MSPB 489, 497-99 (1980); Toppi v. Office of Personnel Management, 2 MSPB 360 (1980). Under 5 U.S.C. § 7701(a) and (b), the Board is mandated to conduct a hearing if requested by appellant, and to consider de novo all the relevant evidence presented by both parties, whether offered at a hearing or transmitted as a part of the administrative record. Nothing in the law or in our regulations restricts an agency to reliance upon its documentary, administrative record, or withholds from that agency a full and fair opportunity to cross-examine or otherwise rebut an appellant's evidence presented for the first time at the Board's hearing. See Chavez, supra, at 320-21. We, therefore, conclude further that the presiding official in the instant case did not err in considering such evidence in arriving at his decision.

While the Board finds that the presiding official properly heard appellant's de novo evidence of his recovery from disability, the Board concurs with the agency that the presiding official erred in considering the de novo evidence as a factor in mitigation of the penalty. See Holloman v. Veterans Administration, 11 MSPB 86 (1982) (the presiding official erroneously relied on the appellant's being granted a disability retirement some three weeks after the effective date of the removal in mitigating the penalty to a suspension because the appellant's offenses were unrelated to the disability retirement determination, the agency was not a party to the disability application

and could not have been expected to have known its outcome at the time it removed him, and such evidence is not a factor that should generally be considered in reviewing an agency-imposed penalty under Douglas).20/ In the instant case, appellant's recovery could not have been reasonably foreseen by the agency at the time it selected the penalty of removal and his de novo evidence does not pertain to the factors that are generally considered in reviewing an agency-imposed penalty. See id.

The Board finds, however, that appellant's de novo evidence is relevant and material to the determination of whether the action effecting appellant's separation is taken "for such cause as will promote the efficiency of the service". 5 U.S.C. § 7513(a). The "efficiency of the service" is the ultimate criterion for determining both whether any disciplinary action is warranted and whether the particular sanction may be sustained, and those determinations are distinct and must be separately considered. Douglas, 5 MSPB at 329-30. In the instant case, there has been a unique intervening substantial change in appellant's physical condition after decision at the agency level and upon de novo review by the presiding official. The de novo evidence submitted by appellant is directly material to the sole charge on which he was removed, i.e., physical disability, and it is related to the physical condition which formed the basis for his removal.

20/ Further, evidence of an appellant's physical or mental disability should be analyzed generally as an affirmative defense of handicap discrimination challenging the bona fides of the adverse action, rather than as a mitigating factor. See Smith v. Defense Logistics Agency, MSPB Docket No. AT07528110262 at 2-3 (July 6, 1983) (the presiding official erred in considering the appellant's alleged mental handicap as a basis for mitigating the penalty); McClarty v. U.S. Postal Service, MSPB Docket No. CH07528210172 at 2 (May 6, 1983) (the presiding official erred by analyzing the appellant's claim of alcoholism as a possible mitigating factor rather than as a claim of handicap discrimination based on alcoholism).

Although appellant had been examined by the agency's medical officer and was treated by two personal physicians prior to the removal action, none of them diagnosed his urological condition or found him physically unable to perform the duties of his position until the agency's physician conducted the July 1983 fitness for duty examination. Shortly after appellant was removed he diligently obtained new medical assistance that led to his recovery from his urological problems and he timely presented this evidence at the hearing before the presiding official. The presiding official found that appellant's de novo medical evidence and his testimony21/ were credible and established that he was currently physically able to perform the duties able to perform the duties and responsibilities of his position despite the discomfort caused by his lumbar spine problem. See initial decision at 4-5, 10-12. The Board gives due deference to the findings of fact and credibility determinations of the presiding official who was present to hear and observe the demeanor of the witnesses. Weaver v. Department of the Navy, 2 MSPB 297, 299 (1980). The agency has not shown that the presiding official's findings of fact on this matter are based on an erroneous application of the statutory requirements governing the weight of the evidence or other cause justifying reversal of the presiding official's fact findings in this regard. Id.

21/ Appellant had a continuous and lengthy satisfactory work record of over seventeen years with the same employing agency. His testimony as to his capabilities, therefore, is entitled to substantial weight. See, e.g., Baker v. Office of Personnel Management, 7 MSPB 258, 261 (1981); Chavez v. Office of Personnel Management, 6 MSPB 343, 358 n. 39 (1981).

The Board concurs with the presiding official that the agency showed by a preponderance of the evidence that appellant was physically unable to perform the duties of his position at the time he was separated. See initial decision at 6. The Board also finds, however, upon consideration of the unique circumstances of this case that appellant's de novo evidence was timely submitted for consideration by the presiding official at the regional office hearing and that the evidence is of sufficient weight to be determinative of the outcome. The Board does not impugn the judgment of the agency based on the facts that it knew at the time it effected appellant's removal.
The Board, nevertheless, finds that the adverse action taken by the agency resulting in appellant's separation is not "for such cause as will promote the efficiency of the service". 5 U.S.C. § 7513(a). See Douglas, 5 MSPB at 329-30.

Accordingly, the initial decision is hereby REVERSED in its findings of fact and conclusions of law regarding the propriety of the penalty. The initial decision is hereby AFFIRMED as MODIFIED by this opinion in its findings of fact and conclusions of law on appellant's affirmative defense of handicap discrimination and the remaining findings of fact. The agency's action removing appellant is hereby REVERSED.

The agency is hereby ORDERED to cancel the action removing appellant. The agency is hereby ORDERED to award back pay and benefits to appellant in accordance with 5 C.F.R. § 550.805. The agency is hereby ORDERED to submit proof of compliance with this order to the Office of the Secretary of the Board within 20 days of the date of issuance of this opinion. Any petition for enforcement of this order shall be made to the St. Louis Regional Office pursuant to 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant has the statutory right under 5 U.S.C. §

7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision, with respect to claims of prohibited discrimination The statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action be filed in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in an appropriate United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. §§ 2000e5(f) - (k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the Court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Stephen E. Manrose

Stephen E. Manrose
Acting Clerk

Washington, D.C.